

The Supranational Rule of Law: Thinking the Future

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La Cour, chaque fois qu'elle est saisie dans le cadre de sa compétence, a l'obligation de se prononcer, l'obligation de dire le droit conformément à la mission générale qui lui est assignée par l'article 16 4

P. Pescatore, *La carence du législateur communautaire et le devoir du juge*

The Constitutional Design: Of Limits and Promises

Writing at the end of 2019 it must be clear that art. 7 TEU is not a viable political option at all. However, the Treaties do contain *legal* mechanisms to enforce the rule of law against the member states. Art. 7 is not, and must not, be the center of the rule of law world in the EU. Rather than spending too much time on unproductive considerations about the need for a new quasi-judicial body that would avoid the criticism of politicization or a new rule of law-mechanism, the effort should have been put on making sure that the Court's decisions are complied with, that the Court keeps getting the right cases, that these cases are framed in a right way and that any non-enforcement of the judgments is met with stern and unqualified sanction. After all, Poland's refusal to obey the Court's judgments and its readiness to do everything possible to circumvent it strike at the very heart of the EU rule of law. The challenge is to use what is legally available rather than keep finding excuses for not using the mechanisms already in place.

Given the contestation of the rule of law by the member states, one theme that will deserve an in-depth treatment is studying to what extent the promise of the rule of law could have been read into the European project since the inception. Judge U. Everling was right when he said:

"Legal texts are never clear and complete. Gaps must be closed by the courts following the principles laid down in legislation, and new developments must be taken into consideration. Such a jurisprudence is not understood as being 'judicial activism' but as Richterrecht or richterliche Rechtsfortbildung which means judge made law".

In this vein in 2019 the Court has been unearthing and making *explicit* what was always *implicitly* embedded in the legal order of the first Communities. If we want to understand the rule of law in the EU in times of constitutional upheavals, we must start engaging more with such meta-level language of identity and belonging. Again, it is here that role of art. 19 TEU must be and will be front and center of the analysis of the emerging transnational understanding of the rule of law. The existential challenge before the EU's discourse on the rule of law is to embark

on, and build a case for, a novel trajectory that would take us from a *rights-based constitutional regime* (already in place in Europe) to a more ambitious *democracy-based transnational rule of law order*. The latter would see “*the transnational rule of law*” to be figuring prominently as one of the essential benchmarks for belonging and identity. It would serve as a novel source of legitimacy for all governance arrangements within the supranational legal order. It would aim to defend the constitutional features/profiles and democratic cores of the units that made up the fabric of the Union. In 2019, the rule of law’s primary function is not to act as a brake against the arbitrariness of European institutions, but rather against member states’ blatant rejection of the core commitment to the rule of law. The latter, not the former, is undermining the rule of law as a shared value in ways hitherto unseen. For the Union to survive, it must not only be able to define (happening now), but also to defend the core that binds all the parties to the consensus and that brought them together. Otherwise the political community is dealt a deadly blow and comes apart at the seams. Agreeing on the essentials is not about pitting one version of the rule of law (“the state”) against another (“the Union”) but rather about enforcing these essentials that make this Union a community based on the rule of law. There is simply no middle ground here.

Moving Forward ...

There are 4 major (often interconnected) challenges as we move forward.

I. The EU must rethink EU membership and the lenses through which it looks at its member states: this requires a bold conceptual shift from the EU as a market-driven entity to a democracy-enforcing supranational community of equal states invested in the supranational legal order and committed to the common project and its systemic and organisational principles. The standard legal framework of enforcement and monitoring dominated by the perspective of rights must also embrace constitutional essentials and structures that make up the fabric of the legal order. The supranational legal discipline sets out the acceptable limits for the use of state power.

II. The EU must critically retool its own legal apparatus, mechanisms and approaches in response to the changing political and legal environment. This calls for the holistic approach that would straddle the political and the legal with each side knowing what and how the other is doing in pursuance of their own fidelities to the system.

III. The EU must refocus its own narrative which should concentrate around the catalogue of fundamental First Principles of transnational governance: The challenge that the EU is facing boils down to not so much the lack of common points of reference, but rather to the lack of understanding among the Peoples of Europe *why* and *how* the quality of democracy and the rule of law in one of the member states should matter to them.

IV. All of us writing on the rule of law must pay more attention to tracking down, understanding and explaining “the social life” and the practice of what I call

“supranational legality“. The challenge before us lies in moving beyond the text and to reconstruct “the social life” or, using the transnational equivalent, [practice](#) of the Treaties. As the EU supranational governance and law are not only about the (imperfect) text(s), but equally about the actors’ actions on the basis of these text(s), the terms “*social life*” and *practice* have the potential to explain how the document and the institutions serve the citizens of the EU. They would bring together the normative (text), empirical (institutions) and sociological. The question how “the Treaty”, understood as an imaginary reference point for our European fidelity, expresses (or not) aspirations of the European citizens, and how it helps (or not) them change their lives for better, [is still neglected](#). As things stand right now, domestic rule of law and politics in the (backsliding) member states are of no concern to the Dutch, French etc. people. Simply put: They are not seen as forming part of the supranational legality.

And Capturing the Essence of the EU Rule of Law

In 2020 and beyond, the EU faces a challenge of *mega-politics* centered around questions of belonging and identity. By belonging to the supranational legal order, its actors limit their choices by committing to the order’s practice and its understanding of legality. What must be appreciated and studied more is the critical interaction between the *legal* dimension of the integration (search for optimal tools and enforcement competences to safeguard the integrity of the EU order) and its *ethical* face (narrative and justification that would explain in the name of whom the EU acts to defend its First Principles). This is where the “EU rule of law discourse” faces its true constitutional challenge before it can lay claim to a rule of law becoming Our Rule of Law. One question that must be addressed head-on is whether it is possible to interpret the rule of law in a way that would move beyond its traditional understanding as merely circumscribed principles geared up to the attainment of the objectives of the Treaties. While we might not yet be in the position to proclaim that we know what exactly the EU rule of law means, it is certainly no longer the case that the rule of law means “different things to different people”. Thanks to the Court, the EU legal order seems to be past the conceptual haziness that has always marked the debate about the rule of law. It is ready to settle on some essential characteristics that form its non-negotiable core binding on all parties and defining their commitment to the European project. If there is one general take-away from the rule of law crisis, it is the gradual emergence of First Principles. The catalogue of such principles goes beyond the sacrosanct direct effect and supremacy and extends to the rule of law as the catalogue’s conceptual and moral heart. We must be honest and explicit that when we say that the rule of law has become an entrenched, overarching and enforceable value and First Principle of the EU legal system, we expound the very basic premise of the political community that the Union no longer aspires to, but undoubtedly is.

The winds of constitutional change and of new openings have been blowing in 2019. Given the radicalization of the domestic politics of resentment (new Polish draft law on the judiciary has disciplinary proceedings in store for these judges that will refuse to apply the statutes incompatible with the EU law without first asking the fake constitutional court and, make no mistake, that is only one of many legal

shenanigans designed to ... fix the judiciary and ... implement the Court's case law), the challenge before the EU cannot be clearer: either learn from the past mistakes in dealing with untrustworthy and disloyal states like Poland and show readiness to look critically in the mirror ... *or* lose all credibility and moral high ground and, ultimately, perish.

In 2020, the EU *technocratic body* will no longer be able carry on without the *principled soul*. While in 2019 the Court of Justice might have indeed started chartering and framing a trajectory for 2020 in these bold Pescatorian terms, in 2020 and beyond it will no doubt need full and unwavering commitment and fidelity to the common project from the political. The EU enters 2020 bruised and hesitant, at times even lost and on the defensive. Whether the faceless, visionless and spineless politics will follow the Court's lead and will be up to the challenge of defending the most precious of European founding values, that of trust in the law and respect for the courts, is anything but certain. This unbearable uncertainty stands as the ultimate proof of the critical juncture that the Union finds itself at.

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